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No. 15

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

APPELLANTS' REPLY BRIEF

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PRELIMINARY

In our original brief (p. 9) we noted that we had urged upon the court below, both on brief and oral argument, the contention that Congress had not empowered the Commission to allow railroads or their affiliates to institute unrestricted truck service by purchase of an existing motor operation. We then stated that "the opinion of the Court nowhere deals with the question." The appellee's response to this reference to the majority's failure to deal with our argument *in its opinion* is that a colloquy between Judge Van Oosterhout and counsel for the Commission, at the argument below, set forth at page 10 of our original brief, plus the fact that the

majority held the Commission's action was contrary to § 212 of the Interstate Commerce Act, "refutes this contention." Appellee's Brief, p. 20. We think it self-evident that a colloquy between a member of the court below and one of counsel at oral argument can hardly substitute for discussion, in the opinion, of the issues raised by other parties to the proceeding. We likewise think it self-evident that discussion of the Commission's power respecting amendment or revocation of properly issued certificates under § 212 can scarcely be substituted for a discussion of the contention we raised, i. e., that the Commission lacks the power, in the first instance, to issue an unrestricted certificate to a railroad or its affiliate through the medium of the purchase of an existing motor operation pursuant to § 5(2)(b) of the Act.

The Appellee's Brief Contains Serious Misstatements of Fact.

We hasten to add that had appellee's brief stopped there, however, this reply brief would not have been filed. It is only because appellee's brief, in its discussion of this phase of the case, contains several serious misstatements of fact that we feel the need to reply. The misstatements are contained in the last paragraph of page 20 of appellee's brief, which is repeated here for convenience:

> No answer to the argument of appellants in No. 15 and No. 16 would be complete without pointing out that this question was never presented to the Interstate Commerce Commission. In fact, there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court (R. 34). The appellants in No. 16 were not even parties before the Commission. Simple fairness would seem to dictate that the Commission should have been given an opportunity to express

its views upon such a question (cf. *United States* v. *Tucker Truck Lines* [1952], 344 U. S. 33, 37). While these appellants express grave concern over an alleged lack of notice with respect to the compliance orders, their concern does not extend to the rail-affiliated motor carriers holding unrestricted certificates which would be rendered valueless if their contentions in this case are upheld. Certainly the present contentions of these appellants constitute a collateral attack upon many certificates, of which attack the rail-affiliated certificate holders were never advised while this case was pending before the Commission.

Boiled down, appellee's argument is that these appellants waited until this proceeding reached the District Court to raise the contention that the Commission lacks power, in a §5 case, to authorize a railroad or its affiliate to conduct unrestricted truck operations, completely uncoordinated with those of the railroad. In addition, it makes the equally flat assertion that the appellants in No. 16 (the rail labor unions) "were not even parties before the Commission." Both assertions are contrary to the facts. Treating the latter first, it should be enough to note that the report of Examiner Waters, made a part of the record by Frisco (R. 73), referred to at page 9 of appellee's brief and printed here, contains the statement: "The Railway Labor Executives' Association was permitted to intervene in these proceedings by the division's order of November 21, 1944." R. 199.[1]

The Motor Carrier Appellants Contended Before The Commission That it Lacked Power to Issue Unrestricted Certificates to a Railroad or its Affiliate.

Here again, appellee's bald assertion is without foundation. As long ago as April, 1945, in a reply brief

[1] Although these appellants are not affected by this particular misstatement, we call it to the Court's attention as an accommodation to, and at the request of, the appellants in No. 16.

filed by the Regular Common Carrier Conference of American Trucking Associations[2] to Frisco's exceptions to the report of Examiner Waters already referred to, the same contention was made which appellee now quite mistakenly says was not raised until the case reached the District Court.[3] In order to refresh Frisco's recollection, and to set the record straight, we quote verbatim (from pp. 9-10) the portion of the brief dealing with the requirements of §5(2)(b):

> The source of the erroneous thinking of Frisco must be in a complete misreading and misunderstanding of the proviso contained in section 5(2)(b) of the act. That proviso prohibits the Commission from approving the acquisition of a motor carrier by a rail carrier unless the Commission specifically finds, among other things, that the transaction will enable the rail carrier to use the motor carrier service to public advantage in *its railroad* operations and will not unduly restrain competition. If that means anything at all, and it must mean exactly what it says, it is that the only circumstance or condition under which a railroad is allowed to acquire a motor carrier at all is one in which the motor carrier may be

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[2] One of the appellants in this case. Jurisdictional Statement, p. 1; Notice of Appeal, R. 187.

[3] The District Court set brief dates, as follows: Frisco was given 15 days to file its brief; defendants and interveners were given 30 days thereafter to file their briefs; Frisco was given an additional 15 days to file a reply brief. R. 161. These appellants raised the question of the Commission's lack of power to issue unrestricted certicates to railroads or their affiliates in our answer to Frisco's complaint (R. 34), and on oral argument (R. 146-148), which Frisco both opened and closed (R. 98, 155). Despite this, Frisco waited until it filed its reply brief in the District Court before it made its contention that we had raised the question too late. Thus Frisco effectively put it beyond these appellants' power to respond to their argument before the District Court. In this Court, Frisco failed to make its contention in its Motion to Affirm, as required by Rule 16(1)(b). Instead, it devoted almost two pages of its brief to a discussion, on the merits, of the question we presented. Motion of Appellee to Affirm, pp. 16-18.

of help to the railroad in the railroad's movement of rail freight, as an adjunct or incident to the rail freight service. It certainly cannot mean that a railroad can acquire an independent motor carrier and thereafter have the motor carrier continue to be independent and competitive. If that were true, the proviso to section 5(2)(b) placed deliberately in the act to prevent just that, would be deprived of all meaning and effect. What the Congress sought to accomplish by the proviso is clearly set forth in the statements of Senator Wheeler and Representative Sadowski on the floors of the Senate and House, respectively. Senator Wheeler said (79 Cong. Rec. 5655):

> "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests."

Representative Sadowski said (79 Cong. Rec. 12206):

> "I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor carrier industry that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of other competing transportation."

From this it is quite clear that unless the motor carrier service of a railroad is to be in fact an adjunct of and an incident to the rail service itself, the railroad cannot acquire it. Certainly that is the clear import of every important Commission decision on the subject since the *Barker* case (1 M.C.C. 101) wherein the reasons for the statutory language and its treatment by the Commission in administration are stated in the following excerpt from the report:

"While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public."

The provision itself is merely a further step in pursuance of the established and well-recognized legislative policy of this country for many years to prevent the domination of one form of transportation by another competing form. That policy was expressed as long ago as 1912 in the Panama Canal Act, in 1914 in the Clayton Act, in 1935 in the Motor Carrier Act, and in 1938 in the Civil Aeronautics Act. It is too firmly rooted in our law to be casually by-passed or ignored, as Frisco apparently wishes done.

The quoted portion of the brief filed before the Commission in 1945 makes it clear that these appellants have contended all along that the Commission lacks power, under § 5, to authorize railroads or their affiliates to

perform unrestricted truck service, and that this contention was made before the Commission, as well as the District Court and this Court. It will thus be seen that Frisco's broad allegation that "there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court" is entirely without foundation. From this it follows that their contention that our argument respecting the Commission's lack of power constitutes a "collateral attack" upon "many certificates" held by rail affiliates is completely invalid.[4] We can readily understand, in view of the long span of time, the likelihood that the brief referred to has been lost or misplaced in Frisco's files. But then, as now, such briefs were filed in the Commission's public docket, and we submit that Frisco should have at least checked there before making its unfounded charge.

The fact that even today, more than a decade after its lack of power was urged in the very proceeding which led to this appeal, the Commission continues to ignore the specific statutory language limiting its power in § 5 cases, is reason enough for this Court to finally settle the question in this proceeding, as suggested in our original brief here (pp. 7-12). Reinforcing this need is the inconsistency of the Commission's decisions. In *Baltimore & Annapolis R. Co.—Purchase—Bison Lines, Inc.*, 60 M.C.C. 509, the Commission, division 4, denied a railroad's application to purchase the operating rights and certain property of a bus company. We submit that the basis for the denial set forth in the report in that

[4] Of course, only four of Frisco's certificates, and no others, whether held by it or any other railroad, are involved here. This was specifically stated by Frisco's counsel in argument before the District Court. R. 100.

case (decided October 4, 1954) represents the proper interpretation of the proviso of §5(2)(b) in cases of this kind. The report states (p. 518):

> Under the proviso of section 5(2)(b), we are required to find, before the railroad may be authorized to acquire vendor's motorbus operations, that it will be enabled to use that motorbus service to public advantage in its rail operations. Compare *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 41. See also *New England Transp. Co.—Control—Short Line, Inc.*, 60 M.C.C. 453, and *Chicago Aurora and E. Ry. Co.—Control—Tri-State Warehousing*, 60 M.C.C. 498. Applicants' argument that the vendee's rail operations are but a small part of its overall operations, and that there is no possibility of any restraint of competition as the railroad has no passenger operations, does not alter the unambiguous language of the statute that it must present evidence to support the required findings. No such evidence was submitted by vendee, nor is it apparent on this record how the statutory requirement can be met by applicant vendee, in view of the location of the railroad, the nature of the service which it renders, and the location of the motorbus properties which it seeks to acquire. We appreciate the practical operating and service aspects of the problem presented, and it appears unlikely that the proviso of section 5(2)(b) was directed at the factual situation here; but the statute makes no exception, and any hardships that may result from applying the law as written are properly for consideration by the Congress rather than by us.

Of course, if the Commission had consistently adhered to the mandate of the proviso of §5(2)(b), as in the cited case, in its decisions involving rail purchase applications, no problem would have arisen. But, as pointed out in our original brief (pp. 10-11), this is not the case. The resulting situation strongly emphasizes the need for this

Court's definitive opinion on this phase of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 7th day of October, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and C. H. Johns, Jr., Esq., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, John E. McCullough, James L. Homire, and Alvin J. Baumann, Esqs., 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY